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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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CARL

IN THE MATTER OF QWEST CORPORATION'S
COMPLIANCE WITH SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996.

Docket No. RT-00000F-02-0271
T-00000A-97-0238

RUCO'S COMMENTS

The Residential Utility Consumer Office ("RUCO") respectfully submits the following comments, additional evidence, and recommendations regarding the impact caused by Qwest's interference with the 271 regulatory process. RUCO's comments do not concentrate on the impact to other CLECs ("Competitive Local Exchange Carrier") caused by certain parties inability to participate. Rather, RUCO's comments focus on the impact on the Commission and its role in assuring that the objectives of the 1996 Telecom Act ("Act") are met and the impact on competition.

Given the enormity of the 252 and 271 proceedings, it is easy to lose sight of the big picture. For competition to have a chance, the Commission must be allowed to do its job to ensure that Qwest is not permitted to use its superior market power against its competitors. For the past three years this Commission has been engaged in the 271 process. For the most part, this Commission was approving the necessary checklist items mandated by the Act. While Qwest was making its case and assuring this Commission that it was in compliance with the various checklist items required by the Act, it was embroiled in a bitter dispute with Eschelon, one of its largest wholesale resellers. The dispute was mostly over issues arising from their interconnection

1 agreements which the parties agreed would not be brought before this Commission. McLeod was
2 also experiencing difficulties arising out of its interconnection agreements with Qwest through the
3 summer of 2001. Exhibit 1. **[CONFIDENTIAL]** Moreover, at least since October 2, 2000,¹ and
4 through a portion of the 271 process, Qwest was secretly providing Eschelon and McLeod with
5 terms it intentionally made unavailable to other CLECs². In exchange for Qwest making such
6 terms available, Eschelon and McLeod were required to agree to cease participating in the
7 Commission's 271 approval process. Despite their interconnection agreements with Qwest,
8 McLeod and Eschelon continued to experience difficulties receiving interconnection-related
9 services from Qwest. See Exhibit 1 and Exhibit 3, **[CONFIDENTIAL]** However, due to the terms
10 of the agreements, McLeod and Eschelon were prevented from making those difficulties known to
11 the Commission in the 271 proceeding. Qwest intentionally did not file the agreements³ and
12 obtained the financial benefit of not providing the same terms to other CLECs, while eliminating
13 any concern that its issues arising out of its interconnection agreements with McLeod and
14 Eschelon would be revealed in the 271 proceeding.

15 Given the benefits to be gained, it appears from the evidence (or lack of evidence) that
16 Qwest gave little or no thought to this Commission and the possible consequences of its illegal
17 activity. The primary motivation for all the parties was the benefit. Qwest agreed to pay McLeod
18 **[CONFIDENTIAL]** over three years. Exhibit 2 at 7, par. 22. Qwest wanted to **[CONFIDENTIAL]**.
19 Exhibit 5. With its other large wholesale carrier, Eschelon, Qwest paid approximately \$2.5 million
20 for consulting services, which at least one Public Utilities Commission has determined to be a

21 ¹The effective date of the unfilled agreements entered into between Qwest and McLeod.

22 ² Qwest terminated the core agreements with Eschelon in a Settlement Agreement dated March 1, 2002.
23 Qwest terminated its October 26, 2000 agreement with McLeod in a Settlement Agreement on September
24 19, 2002. Staff has identified 32 unfilled agreements containing terms that were otherwise unavailable to
other CLECs that Qwest entered into with Eschelon and McLeod in Exhibit "F" to its Supplemental Report of
August 14, 2002. The factual part of RUCO's comments will focus primarily on Qwest's disputes with
Eschelon.

³ See Minnesota PUC Order adopting ALJ's Report and Establishing Comment Period Regarding Remedies
("Minnesota Order") Exhibit 4 at 7.

1 "sham"⁴. In exchange, among other things, Eschelon and McLeod agreed to not participate in 271
2 proceedings. Everybody's needs were met.

3 To truly understand the impact on competition, the Commission must consider the
4 bargaining positions of the parties. Qwest exploited its monopoly power to make sure that
5 Eschelon did not divulge to this Commission the on-going service problems it was experiencing
6 with Qwest. Eschelon depended on Qwest to access its essential services and believed it had no
7 choice but to remain quiet and capitulate to Qwest's demands. [CONFIDENTIAL] Exhibit 3 at 4.

8 In addition to preventing Eschelon from disclosing its difficulties with Qwest to the
9 Commission, Qwest also attempted to destroy evidences of those difficulties. At some point in or
10 about the summer of 2000, Eschelon noted a discrepancy between the access minutes recorded
11 by Eschelon customers and the access minutes reported to Eschelon by Qwest.⁵
12 [CONFIDENTIAL] Qwest's proposed Confidential Billing Settlement Agreement sent to Eschelon
13 on October 30, 2001 corroborates Eschelon's version of the events. Paragraph seven provides
14 that Eschelon was to deliver to Qwest "all reports, work papers or other documents related to the
15 audit process described in that [July 3, 2001] letter."⁶ Exhibit 11. The Settlement Agreement was
16 signed by Qwest but not by Eschelon.

17 Qwest exploited its market power to try and solicit favorable testimony from Eschelon. In
18 the Confidential Purchase Agreement dated October 30, 2001 sent to Eschelon with the
19 Settlement Agreement, Qwest required that Eschelon refrain from participating or initiating any
20 proceeding before this Commission where Qwest's interests may be implicated. Qwest further
21 required that Eschelon, when requested by Qwest, file supporting testimony and testify when
22 requested by Qwest and in the "manner suitable to Qwest (substantively)". Exhibit 12, Confidential

23 ⁴ See excerpt of testimony of Arturo Ibarra at page 9 (Exhibit 6) Findings of Fact, Conclusions,
24 Recommendation and Memorandum at par. 126 adopted by the Minnesota Order. Exhibit 7.

⁵ See Exhibit 9, letter of Audrey McKenney to Richard Smith, President of Eschelon, dated July 3, 2001.

⁶ The July 3, 2001 letter is attached as Exhibit 9.

1 Purchase Agreement, Section 3. The Purchase Agreement was signed by Qwest but not by
2 Eschelon.

3 Qwest was able to exploit its monopoly power over Eschelon because of its superior market
4 position. Herein lies the true impact on competition. The playing field was not level and this
5 Commission never had the chance to level the playing field⁷. For competition to have a chance, it
6 is incumbent on the Commission to make sure that during negotiations, no party feels that they are
7 in an inferior bargaining position. The CLEC has to feel that it can negotiate with the Incumbent
8 Local Exchange Carrier ("ILEC") at arms length. The CLEC has to know that they can depend on
9 the Commission if the ILEC manipulates its monopoly power.

10 Likewise, the CLECs as well as the ILEC have to know that there will be significant
11 consequences if they allow either or both to manipulate the market. The parties gambled that their
12 scheme would not be uncovered. There is no evidence that the parties worried about the
13 consequences. It was simply a cost of doing business. From Qwest's view, this Commission's
14 penal power is insignificant to a company where admittedly a [CONFIDENTIAL] dollar
15 commitment is not a large matter. Exhibit 14, [CONFIDENTIAL].

16 The primary adverse impact of Qwest's actions was to damage the regulatory process,
17 frustrating this Commission's attempts to implement the 1996 Telecom Act. The most obvious
18 remedy would be to dismiss the 271 review proceeding, wipe the record clean, and start the entire
19 process over with full knowledge of the secret agreements. This could potentially undo some of the
20 damage to the regulatory process caused by Qwest's actions, and it would be costly for Qwest.
21 However, it would also punish the Commission, CLECs, and other participants in the 271 process
22 by requiring them to expend large amounts of time and energy relitigating the issues. Furthermore,
23 it would harm the public by delaying the benefits of increased inter-LATA competition. Even if a
24 completely "fresh start" could somehow undo the damage from Qwest's actions, this would not be

⁷ [CONFIDENTIAL]

1 an adequate remedy because it would place too great a burden on the Commission and other
2 participants in the regulatory process.

3 RUCO believes it is possible to fashion a remedy for Qwest's actions that strengthens the
4 regulatory process by helping the Commission do a more effective job of implementing the 1996
5 Telecom Act. More specifically, RUCO recommends establishment of a two-part fund designed to
6 facilitate arbitrations between Qwest and CLECs, and to assist the Commission in policing the
7 1996 Telecom Act and facilitating the transition to effective competition.

8 The first part of the fund would help cover costs the Commission and its staff incur in
9 monitoring competition conditions and investigating and resolving issues related to the 1996
10 Telecom Act and the transition to competition, including ILEC-CLEC disputes. Establishing a
11 separate fund for this purpose will allow the Commission to do a better, more thorough job
12 implementing the 1996 Telecom Act and facilitating a transition to effective competition, without
13 taking regulatory resources away from other industries, and other pressing issues.

14 The second part of the fund would cover the out of pocket costs CLECs and other parties
15 incur when participating in proceedings before the Commission, including ILEC-CLEC dispute
16 resolutions, and investigations into issues related to the 1996 Telecom Act and the transition to
17 competition, including detailed investigations into key factors that are slowing the transition to
18 effective competition.

19 RUCO recommends that Qwest be required to make an initial contribution of \$750,000 into
20 each part of the Fund. Thereafter, Qwest would be required to annually contribute an amount to be
21 determined by the Commission each year, but the minimum annual amount contributed to each
22 part of the Fund will be not less than \$500,000 and not more than \$950,000. Annual contributions
23 would be required for at least 5 years, but not more than 7 years. Given these parameters, Qwest's
24 total contribution would be at least \$6.5 million over 5 years, but not more than \$14.3 million
spread over 7 years.

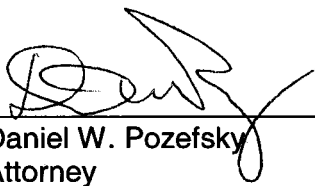
1 RUCO recommends leaving the precise funding level to the Commission's discretion, as
2 experience is gained and it becomes possible to more accurately determine the appropriate size of
3 the fund. Annual contributions should continue for not less than 5 years, but could be extended for
4 up to two additional years, at the discretion of the Commission. RUCO believes that establishing a
5 contribution range and duration (rather than requiring a specific total contribution) will provide
6 Qwest with a stronger incentive to co-operate with the Commission and other participants in the
7 regulatory process, trying to ensure that all relevant facts are brought to the Commission's
8 attention without unnecessary delay and expense. As well, this provides Qwest with an increased
9 incentive to minimize UNE provisioning problems and other difficulties encountered by the CLECS.
10 By amicably resolving disputes with CLECs that might otherwise need to be brought before the
Commission, Qwest can minimize its total contributions into the fund.

11 Money in the first part of the fund will be used to help cover the Commission's cost of
12 investigating, hearing and resolving issues and disputes related to the 1996 Telecom Act and the
13 transition to effective competition. For example, a portion of the fund could be used to cover the
14 salary of an additional Administrative Law Judge, ensuring that adequate ALJ resources are
15 available for these disputes and investigations.

16 Money in the second part of the fund will be used to encourage active participation by
17 CLECs and other interested parties. Amounts would be awarded to CLECs and other parties on a
18 case-by-case basis to cover all, or a reasonable portion of, the costs incurred by the party. To
19 protect against abuse, the Commission would not reimburse a party's costs when its participation
20 was frivolous or completely without merit. Parties should receive full reimbursement of their out-of-
21 pocket costs even if the Commission ultimately rejects their position in the proceeding, provided
22 the party's participation was in good faith and it served to further the underlying purpose of the
23 1996 Telecom Act. Where a party's participation only partly meets these criteria, or where funding
constraints make full reimbursement impossible, partial reimbursement should be provided.

1 RUCO believes that establishing such a fund would serve to ameliorate the harm to the
2 regulatory process caused by Qwest's conduct, and it would provide a substantial long term
3 improvement in the Commission's ability to carry out its responsibilities under the 1996 Telecom
4 Act. The Commission would be provided with additional resources that can be directed towards
5 fulfillment of the goals of the 1996 Telecom Act, and it would encourage broader, more active
6 participation by CLECs and other parties that cannot otherwise afford to fully participate in the
7 regulatory process. Not only is this remedy closely tailored to the specific damage resulting from
8 Qwest's actions, but it will broadly advance the public interest, and will be less costly than fully
9 relitigating the 271 proceeding, which would result in substantial waste and inefficiency, and would
10 delay the benefits of increased long distance competition.

11
12 RESPECTFULLY SUBMITTED this 10th day of January, 2003.

13
14 
15 Daniel W. Pozefsky
16 Attorney
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By 
Jennifer Rumph

EXHIBIT

1

From: Audrey McKenney [axmcken@uswest.com]
Sent: Wednesday, April 25, 2001 7:40 PM
To: Blake O. Fisher
Cc: Greg Casey; Filip, Dana; Dalton, Joe (VP)
Subject: Re: First quarter meeting

Hi Blake -

After our call today, I did some quick follow-up on the five issues you raised in the enclosed email. Here is the status:

. Service quality standards - within the last few weeks we have reached agreement on the metrics, definitions, and for the most part, the performance targets. Next step is to review our trended service performance, action plans, and projected targets at our executive meeting. At the meeting, after the service discussion, we can determine if our performance / plans are satisfactory and appropriate actions / remedies from business to business perspective.

. Executive meeting - we have a meeting scheduled for May 1 that can be expanded to include discussion on service performance. In addition, Dana's assistant is confirming a final May date to discuss the agenda items in your mail.

1. Intellispan / nonsolicitation clause - Our attorneys have been communicating with John Gumbel. We were notified several days ago that McLeod has made a midstream change -- instead of Intellispan being maintained as a separate subsidiary, it will now be integrated into existing McLeod organizations. Since our attorneys only received a voice message, they are seeking clarification from McLeod to confirm. If so, current nonsolicitation language will need to be reevaluated / changed. Blake -- pls let me know from your perspective what McLeod plans to do with Intellispan. This is not consistent with what we talked about. I don't think this will be a problem but we need to know the current situation to make sure we're OK and documents can be properly re-drafted.

1.a. Voicemail - Below is the chronology of events:

10/2000 VMS availability information given to Barry Huber at McLeod.

11/2000 UNE-STAR agreements executed

2/2001 - Stacy Stewart at McLeod requested a single voice messaging rate across all 14 states. Qwest presented Business Voice Messaging Volume plan to McLeod with a single recurring rate across all states. However, the nonrecurring charge did vary by state. Lowest rates available that were presented (excludes vendor relationship contracts):

Business VMS / UNE-M - up to 30% discount from monthly retail rates. Up to 500 mailboxes per Central Offices, 5 year term, the \$12.75 drops to \$8.93.

Residential - since UNE M applies to business lines, the wholesale rate

ould be the resale discount applied to retail rates in IA, MT, OR, and ND;
or the other states the price would be \$6.95.

olume-term pricing matrices were provided.

cLeod indicated that they would get back to us but did not believe that
hey would buy VMS from Qwest because they could self-provide for \$5.00.
We indicated that we could not offer the service at that rate --
ffectively 60% from our retail rates. We did ask if McLeod is willing to
ffer VMS to Qwest at \$5.00, we would be willing to talk to our folks about
cLeod provisioning the service for us.)

lake, please let me know if your team is awaiting or needs additional
nformation. Any assistance you can give us in this arena would be helpful.

b. DSL services

8/2/2001 Provided "enhanced" DSL offering to Stacey Stewart, Kim Lehman,
Doug Dalby, Terry Mallard at McLeod.

umerous conversations have occurred. Last indication from McLeod a couple
weeks ago was that they were determinng whether to self-provision or resale
DSL. Qwest is awaiting response from McLeod.

Again, Blake, please let me know if your team is awaiting or needs
additional information. Any assistance you can give us in this arena would
be helpful.

5. Service Performance - as part of our executive meeting, Dana and her
team will do a full review of our performance, action plans and performance
projections

Blake, if at any time you are concerned about our service performance on any
particular product or in a state, please immediately call Dana, Greg or
myself. As Greg and I discussed with you today, we take our service
performance very seriously and we want to make sure we are meeting your
expectations. If not, we need to quickly resolve it. Most importantly, you
are a valued customer and we appreciate your business.

Please give me a call and I would be more than happy to further discuss
these items with you.

Thanks - Audrey

"Blake O. Fisher" wrote:

Greg,

I must start out by telling you I am really frustrated.

1. We created a business relationship last October and we met in December

with
he agenda shown below. We have made essentially no progress. I thought we
ad
momentum on performance measures, but that has been at a standstill for 3
weeks.

2. We have been trying to set up a quarterly review with you and your team
for
two weeks. Not set up yet

3. I asked Audrey for a favor on a consent concerning a Company we are
buying.
She agreed in principle. Your lawyer will not return our calls.

4. No progress on voicemail, residential proposal DSL, etc., etc,
etc.....

5. Your PR group calls us for a quote on your improved service levels. I
declined because I have no evidence improvement.

I do not feel like one of your major customers.

Having said that I propose that we get a meeting to:

1. Review first quarter.

2. Get an action plan with dates that you agree to meet or tell us to pound
sand.

3. Outline a new deal that addresses the following:

A. For Qwest:

A. Performance measures and remedies that we can both support in your
271
proceedings.

B. Additional LD business

C. Network links that we may want to buy.

D. Additional local business, e.g. Residential, voice mail, DSL

(although
this may be too late)

B. For McLeod

A. IMT's to replace PRI's with better pricing.

B. Residential pricing plan.

C. Voice Mail discount plan

D. IMT pricing

E. Network we sell to you

F. Revisit our override discount.

G. Wholesale performance measures and remedies (business critical)

beyond

what is in the regulatory filings.

C. We should also both understand our differences in the legislative and
regulatory arenas.

Do you want to pursue an amended deal?

----- Forwarded by Blake O. Fisher/MCLEOD on 04/25/2001

09:40

AM -----

CONFIDENTIAL

McLeodUSA and Qwest Version 2 Business to Business Deal Proposed Term Sheet May 21st, 2001

1. Performance Measures and Remedies

- a) McLeodUSA will accept the Qwest PAP/PID with the exception of the attached document incorporating a Parity with a Floor concept on the most important 5 measures for McLeodUSA. The effective date of these measures will be November 1, 2000.
- b) Qwest will provide the remedies associated with the PAP plus the remedies for the 5 Parity with the Floor measures in the attached document beginning with November 2000 performance.

2. Product and Pricing

- a) Qwest to provide McLeodUSA with a resell voicemail offering that includes a discount structure in exchange for a minimum commitment. See attached document.
- b) Qwest to provide McLeodUSA with a residential line program similar to our UNE-M offering. Assumptions and analysis to be sent separately.
- c) Qwest to provide McLeodUSA with a flat rate T-1 offering similar to our UNE-M offering.
- d) Qwest to provide a region-wide PRI rate of \$400 to McLeodUSA for all existing PRI's and any future PRI. This rate would be retroactive to November 1, 2000.
- e) Qwest to offer McLeodUSA their DSL VDP program with changes. See attached
- f) Qwest to provide a 30% discount on all intralata toll charges
- g) Qwest will provide Wire Care/Wire Maintenance to McLeodUSA region-wide with our state specific wholesale discount.

3. In recognition of the preceding, McLeodUSA will provide to Qwest an increased commitment of revenue and term which includes an additional discount tier.

4. Both companies to work toward completing the sale of IRU's.

5. Regulatory

- a) Qwest will provide a 'friendly' witness and testimony in support of UNE-P/UNE-M in the SBC markets in order to help facilitate and prove McLeodUSA's position that this type of conversion activity can be a billing change and requires minimal effort on the part of the ILEC and Qwest would be willing to communicate this position to the FCC. See attached testimony.
- b) McLeodUSA will support Qwest in their plans for 271 applications in all states within their ILEC footprint.
- c) McLeodUSA will encourage and participate in any settlement in Minnesota on Wholesale Quality of Service proceedings.

From: Stacey D. Stewart [sstewart@McLeodUSA.com]
Sent: Tuesday, July 31, 2001 9:14 AM
To: Filip, Dana
Subject: PAP Support



Mac Word 3.0



Mac Word 3.0



Mac Word 3.0



Mac Word 3.0

YI on information that went to your attorneys 10 days ago. I don't see how here can be any confusion on the position???

or your internal fight which I suspect will happen.

hanks
tacey

----- Forwarded by Stacey D. Stewart/MCLEOD on 07/31/2001

0:14

M -----

7/20/2001 07:04 PM

William P. Heaston

To: dpooles@qwest.com, lstang@qwest.com, jhgalle@qwest.com
Cc: Randall E. Rings/MCLEOD@MCLEOD, Stacey D. Stewart/MCLEOD@MCLEOD, Rod Cox/MCLEOD@MCLEOD, Blake O. Fisher/MCLEOD@MCLEOD
Subject: PAP Support

This is to reiterate my telecon w/Lynn on Friday afternoon and to add detail. I talked with Randy Rings, Stacey Stewart and Rod Cox. Affirmative support for any Qwest 271 initiative is at least dependent on the following:

1. Agreement as to a past amount (11/1/00 to 7/1/01) McLeodUSA believes is due based on Qwest's performance in all 14 states. A ballpark amount is \$14M.
2. Agreement on and implementation of an interim PAP. The amount in 1, above, was determined based on an interim PAP that was supposed to be agreed to as a part of the 10/00 business agreement. McLeodUSA has provided, on more than one occasion, what it believes the plan should be.
3. A good faith response to and negotiation of additional business arrangements as proposed by the term sheet provided to Qwest on 5/21/01. The term sheet contains the latest interim plan proposal (PAP+5), although some version the plan was first provided to Qwest almost contemporaneous with the signing of the deal last October.

There has been, in McLeodUSA's view, no legitimate Qwest response to any of this.

Attached are the documents which McLeodUSA has provided to Qwest

See attached file: Term Sheet Version 2, 5-21-01.doc)(See attached file:
erm
heet PAP + 5, 5-21-01.doc)(See attached file: Term sheet vmail attachment
-21-01.doc)(See attached file: Term sheet DSL resale attachment
-21-01.doc)

ore recently Stacey Stewart had a meeting (just prior to the July 4th
oliday)
with Dana Filip on these issues. There has been no response.

Randy and Steve did discuss the issue of performance audits. The audits
ould
be done by an independent third party. The audits would be used to check
performance as reported by Qwest. Qwest would agree that the audits are
worthwhile and support efforts to get the same audits imposed in SBCland.
The
audit issue seems to have as much value for Qwest in its competitive efforts
in
SBCland, as it does for McLeodUSA. McLeodUSA might be willing to pay for a
part
of such an auditing process. Steve was to look into the cost of an audit.
McLeodUSA does not believe the audit is an essential part of what it will
take
to get McLeodUSA to affirmatively support 271.

EXHIBIT

2

EXHIBIT

3

EXHIBIT

4

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Marshall Johnson
LeRoy Koppendrayner
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of the
Minnesota Department of Commerce Against
Qwest Corporation Regarding Unfiled
Agreements

ISSUE DATE: November 1, 2002

DOCKET NO. P-421/C-02-197

ORDER ADOPTING ALJ'S REPORT AND
ESTABLISHING COMMENT PERIOD
REGARDING REMEDIES

PROCEDURAL HISTORY

On February 14, 2002, the Commission received a complaint against Qwest filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. § 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange companies (CLECs), has acted in a discriminatory and anti-competitive manner.

On March 12, 2002, the Commission issued a NOTICE AND ORDER FOR HEARING referring the matter to the Office of Administrative Hearings (OAH) for a contested case proceeding. The Commission determined that the issues to be addressed by an Administrative Law Judge (ALJ) were as follows:

- 1) whether the agreements, or any portion thereof, needed to be filed with the Commission for review;
- 2) whether they were filed under other settings;
- 3) whether there were any exculpatory reasons why they were not filed; and
- 4) whether disciplinary action/penalties are appropriate.

Administrative Law Judge (ALJ) Allan W. Klein was assigned to the case.

On April 29, 2002, hearings regarding the eleven agreements commenced and were completed on May 2, 2002.

On May 24, 2002, the Department petitioned the ALJ to reopen the record to admit evidence regarding an alleged, newly discovered, oral, twelfth agreement. The ALJ granted the Department's request.

On August 6, 2002, the ALJ heard arguments regarding the twelfth agreement.

On September 20, 2002, the ALJ submitted his *Findings of Fact, Conclusions, Recommendation and Memorandum* (ALJ Report) to the Commission.

On September 30, 2002, Qwest filed exceptions to the ALJ Report.

On October 4, 2002, the Federal Communications Commission (FCC) issued its Memorandum Opinion and Order in *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope and Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)* (WC Docket No. 02-89, October 4, 2002). The FCC stated in ¶ 8:

[W]e find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). [emphasis in original].

On October 8, 2002, Commission staff requested comments from parties regarding the impact of the FCC's Memorandum Opinion and Order on the current proceeding.

On October 10, 2002, replies to Qwest's exceptions were filed by AT&T.

On October 11, 2002, replies to Qwest's exceptions were filed by the Department.

On October 16, 2002, the following parties filed comments regarding the impact of the FCC's October 4, 2002 Memorandum Opinion and Order on the current proceeding: Qwest, the Department, and AT&T.

The Commission met to consider this matter on October 21, 2002.

FINDINGS AND CONCLUSIONS

I. SUMMARY OF COMMISSION ACTION

In this Order the Commission adopts the ALJ's report in its entirety, including the ALJ's findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms.

The Commission also finds, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat. § 237.121, subd. 5, and Minn. Stat. § 237.60, subd. 3.

Finally, the Commission adopts the ALJ's recommendation that the Commission take action against Qwest for its activities detailed in the ALJ's report.¹ To prepare to decide what form that action should take, the Commission will schedule input from the parties regarding what the precise remedies (monetary and/or non-monetary) should be in this matter.

II. ALJ'S REPORT

The ALJ concluded that :

- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 251, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that Qwest has violated the provisions of 47 U.S.C. § 252, as more particularly set out in the Findings of Fact.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 251 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that each of Qwest's violations of 47 U.S.C. § 252 were knowing and intentional.
- The Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. The Commission is not limited, however, to a monetary penalty. Subdivision 9 of that statute explicitly allows the Commission to use other enforcement provisions available to it for these same violations.

Based on these conclusions, the ALJ recommended that the Commission take action against Qwest for its activities detailed in his Report.

III. QWEST'S EXCEPTIONS TO THE ALJ'S REPORT

Qwest objected to the ALJ's Report, arguing the following.

- The ALJ Report is fundamentally flawed because it applies a nonexistent standard and ignores the weight of the evidence in recommending that the Commission impose penalties against Qwest.
- The standard proposed, defining which terms must be filed for approval, is so broad and indefinite that it is impossible to apply.
- There is no evidence in the record that Qwest knowingly and intentionally did not file agreements under § 252.

¹ ALJ Report, page 54.

- The record is replete with unrebutted evidence of non-discrimination, which the ALJ Report improperly disregards.
- The ALJ Report erred in finding that penalties should be assessed. There is no evidence in the record that Qwest saved anything by not filing; that CLECs sustained any harm; that there are any past violations; that Qwest did not take corrective action; that Qwest structured the agreements to avoid disclosure; or that Qwest's revenues, assets, and ability to pay support penalties.

IV. COMMISSION ANALYSIS OF THE ALJ'S REPORT

A. Knowing and Intentional Failure to File Interconnection Agreements

The ALJ analyzed eleven written agreements between Qwest and various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA that Qwest has never reduced to writing and submitted to the Commission for approval.

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.²

Accordingly, the Commission agrees with the ALJ that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.³

² As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10.

³ See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

B. Discrimination

47 U.S.C. § 251 (b) (1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale, and § 251 (c) (2) (D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. Section 251 (c) (3) requires incumbent LECs to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

In each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than the terms, rates and conditions that it made available to the other CLECs and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest discriminated against the other CLECs in violation of Section 251.

Furthermore, there is no question that Qwest knew that it was extending special terms to the select CLECs and that it was keeping these terms secret from CLECs in general. Accordingly, the Commission agrees with the ALJ that Qwest's discrimination in violation of 47 U.S.C. § 251 was knowing and intentional.⁴

Qwest argued that before a violation of discrimination under 47 U.S.C. § 251 can be found, the Commission must find that the secretly offered term, rate or condition was something that particular CLECs desired and qualified for and that the unavailability of that term, rate, and condition injured particular CLECs. Qwest's argument is a diversion. Clearly, Section 251 is not simply a remedial provision for individual CLECs, but an important regulatory tool to assure a level playing field between competing local service providers. The extent of monetary harm caused to particular CLECs is a relevant factor to be shown and considered in determining monetary penalties and non-monetary remedies in a subsequent phase of this proceeding.⁵ But as a foundation for simply finding violation of the anti-discrimination provisions of Section 251, the particularized findings of monetary harm that Qwest would require are unnecessary.

In short, with respect to violation of the anti-discrimination provisions of Section 251, the question is simply: did Qwest offer preferential interconnection-related treatment to some CLECs? The Commission finds that Qwest did, and this is discrimination under Section 251. And with respect to "knowing and intentional," the question is: did Qwest know that it was offering preferential treatment to some CLECs and intend to give that preferential treatment? The Commission finds that it did know it was offering preferential treatment and intended to offer preferential treatment, which makes its action knowing and intentional. Accordingly, the Commission agrees with the ALJ's findings that Qwest knowingly and intentionally violated 47 U.S.C. § 251.

⁴ See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

⁵ Harm to customers or competitors is specifically listed by Minn. Stat. § 237.462 as a factor to consider in determining the amount of penalty to be imposed, not whether a penalty should be imposed.

V. VIOLATION OF STATE STATUTES

The record compiled by the ALJ also supports finding that Qwest has violated state laws in at least three respects.

Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service. As discussed above, Qwest has provided preferential treatment to some CLECs and has done so knowingly and intentionally, in violation of federal law. The discriminatory actions cited, therefore, also knowingly and intentionally violate the above-cited Minnesota statutes because the discriminatory activity is the same and the local service affected is clearly intrastate service.

Minn. Stat. § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." It is an unreasonable restriction on resale to withhold favorable terms offered to competitors.

The Commission notes that these findings of knowing and intentional violations of these state statutes trigger possible imposition of administrative monetary penalties under Minn. Stat. § 237.462 and non-monetary remedies pursuant to Minn. Stat. § 237.462, subd. 9.

VI. REMEDIES PHASE OF THE PROCEEDING

Based on the findings and conclusions of the ALJ's Report and the findings and conclusions herein, the Commission will proceed to consider what remedies appropriately address the situation.⁶ The Remedies Phase will include consideration of 1) penalties for violation of state and federal law pursuant to Minn. Stat. § 237.462 and 2) non-monetary corrective measures which derive from other Commission authority or 3) those which the Commission must refer to the Attorney General or other appropriate authorities for pursuit.

The Commission will invite remedies proposals from all parties and provide each party opportunity to comment upon each others' proposals.

Parties should analyze their proposals and evaluate the proposals of others with reference to the factors set forth in Minn. Stat. § 237.462, subd. 2(b) and Minn. Stat. § 237.462, subd. 9. Among the issues that parties may wish to address in the course of their comments are the following:

1. Quantification of monetary harm done to specific CLECs by the activity found in the ALJ's Report (and confirmed in this Order) to have taken place.

⁶ This Order adopts the ALJ's Report in its entirety. In the Remedies Phase which follows this Order, therefore, no part of the ALJ's Report will be subject to revisiting and no issue addressed in that Report will be subject to relitigation or reargument. The Report's findings and conclusions may be utilized as bricks to help construct any argument for or against any remedies proposal.

2. Quantification of monetary benefit accruing to the benefitted CLECs and Qwest by this activity.
3. A rationale, including the mathematical calculation (number of violation days times a dollar amount for each violation day), for any monetary penalty proposed.
4. Public interest analysis (pluses and minuses) of various non-monetary remedies, including structural separation and revocation of Qwest's certificate of authority.
5. Whether any information in this docket is properly classified as trade secret or whether the entire record in this matter should be available to the public.
6. Proposed treatment of the interconnection agreements that have been subject to this proceeding that have not been terminated.

Parties' comments will be provided by briefs and supporting affidavits pursuant to the following schedule, which Qwest proposed and to which other parties agreed:

November 8 parties submit opening briefs and supporting affidavits

November 15 parties submit reply briefs and supporting affidavits

VII. ROLE OF THE BENEFITTED CLECS

This docket has focused, properly, on Qwest, the central player in the undisclosed interconnection agreements episode. As the incumbent local exchange company (ILEC) in this matter, Qwest holds a unique economic position and certainly bears direct and obvious responsibility under the cited federal and state statutes. The Commission is also concerned, however, about the role of certain CLECs that have participated in and benefitted from the illegal Qwest activity documented in this record. The Commission welcomes the Department's expressed commitment to examine the role of these CLECs and bring these matters forward for Commission consideration in due course and as warranted.

ORDER

1. The Commission adopts the Administrative Law Judge's Report in its entirety, including its findings that Qwest has knowingly and intentionally violated federal laws regarding the interconnection agreement provisions cited therein. A copy of the ALJ's Report is incorporated by reference.
2. The Commission finds that Qwest has also knowingly and intentionally violated state laws as enumerated above at page 6 of this Order.
3. The Commission initiates the Remedies Phase of this proceeding by establishing a comment period, as discussed above at pages 6 and 7 of this Order.
4. The schedule for the Remedies Phase is as follows:

November 8 parties shall submit opening briefs and supporting affidavits
November 15 parties shall submit reply briefs and supporting affidavits
November 19 Commission hearing

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

EXHIBIT

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EXHIBIT

6

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 SEVENTH PLACE EAST, SUITE 350
ST. PAUL, MINNESOTA 55101-2147

Gregory Scott	Chair
Edward A. Garvey	Commissioner
R. Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Phyllis Reha	Commissioner

In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation

Docket No. P-421/C-02-197

OAH Docket No. 6-2500-14782-2

QWEST CORPORATION'S WRITTEN DIRECT TESTIMONY
OF ARTURO IBARRA

1 Q: HAS ESCHELON MET THE GOALS REFLECTED IN THE
2 CONFIDENTIAL PURCHASE AGREEMENT?

3 A: Yes, each year, Eschelon has exceeded the annual purchase commitments set
4 forth in the Confidential Purchase Agreement.

5 Q: HOW WERE THE CONSULTING AND NETWORK-RELATED
6 SERVICES BILLED TO QWEST?

7 A: Under the consulting and network-related services agreement, Eschelon was
8 going to provide Qwest with an annual invoice for the services. However, the parties soon
9 agreed that Eschelon would invoice Qwest on a quarterly basis.

10 Q: HOW MUCH HAS QWEST PAID TO ESCHELON UNDER THE TERMS
11 OF THE CONSULTING AND NETWORK-RELATED SERVICES PROVISION?

12 A: Qwest paid Eschelon a total of \$2,540,016 under the terms of the consulting
13 services and network-related services agreement, for services rendered through September 30,
14 2001. Qwest has not made any payments under the consulting and network-related services
15 agreement to Eschelon since November 9, 2001.

16 Q: HOW WERE THE PAYMENTS TO ESCHELON MADE FOR THE
17 CONSULTING AND NETWORK-RELATED SERVICES?

18 A: Qwest issued wires to Eschelon.

19 Pro Rata Credit for Switched Access

20 Q: THE COMPLAINT QUOTES PARAGRAPH 3 OF ESCHELON
21 AGREEMENT IV, WHICH CONTAINS A PROVISION BY WHICH QWEST AGREED
22 TO CREDIT ESCHELON \$13 (OR A PRO RATA PORTION THEREOF) "FOR ANY
23 MONTH (OR PARTIAL MONTH), FROM NOVEMBER 1, 2000 UNTIL THE

EXHIBIT

7

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
Unfiled Agreements

**FINDINGS OF FACT,
CONCLUSIONS, RECOMMENDATION
AND MEMORANDUM**

Hearings in this matter were held on April 29-May 2, 2002 and August 6, 2002, at St. Paul, Minnesota. The record closed on September 13, 2002, upon issuance of the final ruling on the contents of the record.

Qwest Corporation ("Qwest") was represented by Peter S. Spivack, Cynthia Mitchell and Douglas R. M. Nazarian, Hogan & Hartson, LLP, 555 Thirteenth Street, N.W., Washington, D.C. 20004-1109. Qwest Corporation was also represented by Jason D. Topp, 200 S. 5th Street, Room 395, Minneapolis, MN 55402.

The Minnesota Department of Commerce ("Department" or "DOC") was represented by Steven H. Alpert, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106.

AT&T Communications of the Midwest, Inc., TCG Minnesota, Inc., and AT&T Broadband Phone of Minnesota, Inc. (collectively "AT&T") was represented by Gary B. Witt and Steven H. Weigler, AT&T Law Department, 1875 Lawrence Street, Suite 1575, Denver, CO 80202.

Onvoy, Inc. was represented by Michael J. Hoff and Joy Gullikson, 1405 6th Avenue North, 3rd Floor, Plymouth, MN 55441.

WorldCom, Inc. was represented by Gregory R. Merz, Grey, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 South 6th Street, Minneapolis, MN 55402, and Lesley James Lehr, 638 Summit Avenue, St. Paul, MN 55101.

The Residential Utility and Small Business Division of the Office of Attorney General ("OAG") was represented by Mary R. Crowson, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101.

Time Warner Telecom of Minnesota was represented by John F. Gibbs and Rebecca M. Liethen, Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402.

III. ESCHELON AGREEMENT IV

119. On November 15, 2000, Qwest and Eschelon entered into an agreement titled Confidential Amendment to Confidential / Trade Secret Stipulation ("Eschelon Agreement IV").⁴⁵

120. Qwest terminated Eschelon Agreement IV on March 1, 2002.

121. Qwest did not submit Eschelon Agreement IV to the Commission for approval under 47 U.S.C. § 252(e) until March 1, 2002, in response to the Department's complaint in this matter.

122. The specific terms set out in Paragraph 3 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.⁴⁶

123. The specific terms set out in Paragraph 2 of Eschelon Agreement IV do not appear in any approved interconnection agreement or amendment thereto between Qwest and Eschelon.⁴⁷

Paragraph 3

124. In Paragraph 3 of Eschelon Agreement IV, Qwest agreed to provide Eschelon with a 10% discount on all of the "aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005."

125. The discount applied to all purchases made by Eschelon from Qwest, including but not limited to switched access fees and Eschelon's purchases of interconnection, UNEs, tariffed services, and other telecommunications services covered by the Act.

126. The "consulting" arrangement described in Paragraph 3 of Eschelon Agreement IV was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. The purported payment outlined in Paragraph 3 for the alleged consulting services had no rational relationship to the services to be provided by Eschelon. Instead, Qwest agreed to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005" regardless of the quantity or quality of work done by Eschelon.

127. Exhibits 479J and 480J show Qwest offering the discount to Eschelon prior to the parties entering into Eschelon Agreement IV

⁴⁵ SUF ¶ 46.

⁴⁶ Ex. 200 – WCD-12 (Qwest response to DOC 064 in the 197 Docket).

⁴⁷ Ex. 200 – WCD-12 (Qwest response to DOC 065 in the 197 Docket).

EXHIBIT

8

EXHIBIT

9



Qwest
1801 California Street, Suite 2350
Denver, Colorado 80202
Phone 303-896-5851
Facsimile 303-896-7473

Audrey McKenney
Senior Vice President
Wholesale Markets Business Development

CONFIDENTIAL AND PRIVILEGED
SUBJECT TO RULE OF EVIDENCE 408

July 3, 2001

Richard A. Smith
President and Chief Operating Officer
Eschelon Telecom, Inc.
730 Second Avenue South
Suite 1200
Minneapolis, MN 55402

Re: Status of Switched Access Minute Reporting

Dear Rick:

Over time, Eschelon has added switches in additional markets and has started to move away from resale to Unbundled Network Element Platform ("UNE-P") for customers not served by those switches. In the course of adding switches and increasing the number of its customers served by those switches in multiple states within Qwest's region, Eschelon has noted a discrepancy between the access minutes recorded for Eschelon customers served by Eschelon's switches (Eschelon's On-Net customers) and the access minutes reported to Eschelon by Qwest for Eschelon UNE-P customers served by Qwest's switches (Eschelon's Off-Net customers). Although Qwest believes that it has accurately recorded switched access minutes, we have agreed to work with Eschelon to verify the accuracy of such records and to determine the reasons why the parties' systems are reporting a different number of switched access minutes. Factors that could potentially be causing the discrepancy include, among other factors, different usage characteristics of Eschelon's On-Net and Off-Net customers, recording and reporting differences between Eschelon's and Qwest's switches, inaccurate reporting by Eschelon to Qwest of Eschelon's Off-Net WTNs, and under reporting of Off-Net access minutes by Qwest.

Eschelon, Inc. has asserted that the tapes which Qwest Corporation provides to Eschelon recording switched access minutes going on the ports of its platform services are lower than the minutes that Eschelon is experiencing based on minutes going through Eschelon's switch. Based on Eschelon's concern, and

Richard A. Smith
July 3, 2001
Page 2

Qwest's desire to ensure that its recordings are accurate, Qwest has agreed to perform an audit with Eschelon.

Since November 2000, as an interim measure, Qwest has been paying Eschelon each month an Interim Amount, which is the difference between thirteen dollars (\$13) per line per month and the amount that Eschelon was able to bill IXCs for switched access, per line, based upon the switched access minutes reported to Eschelon by Qwest. Eschelon has devoted substantial internal and external resources to switched access issues, including resources associated with the audit, traffic studies, and hiring of personnel with expertise in access issues. In consideration for this, as of January 1, 2001 and continuing until Qwest and Eschelon agree to do otherwise, Qwest will increase the Interim Amount to the difference between \$16 per line per month and the amount that Eschelon is able to bill IXCs for switched access, based upon the switched access minutes reported to Eschelon by Qwest.

In order to determine whether Qwest's reporting of access minutes has been correct, the parties are undertaking a joint analysis, including an audit of the switched access minutes reported by Qwest and Eschelon (the "Audit"). The Audit will proceed in accordance with the scope of work previously agreed to by the parties. Once the Audit is completed, the parties have agreed to true up the difference between \$13 per line and the actual amount that Eschelon should have been able to bill to its carrier customers as calculated above (less any amount that Eschelon is able to backbill to its carrier customers) based on its tariffed rate.

Eschelon has also noted an issue relating to access records for Qwest's intraLATA toll traffic terminating to customers served by an Eschelon switch. The ongoing analysis and resources expended by Eschelon and Qwest will also address this issue. As of June 1, 2001, until the Parties agree that the issue is resolved, Qwest will pay Eschelon \$2.00 per line per month for such traffic.

Using the results of the Audit, the parties will also negotiate the terms and conditions of any subsequent analysis or procedures to be followed, and for resolution of future discrepancies between the switched access minutes indicated by Qwest and the minutes recorded or believed to be accurate by Eschelon.

Qwest and Eschelon want to avoid complaints and find business solutions to their problems. In working on service issues, while the audit is occurring and depending upon the results of the audit and the negotiations, Eschelon agrees that it will not seek payment of sums due from Qwest to Eschelon, if any, related to the Direct Measures of Quality ("DMOQs") in Minnesota pursuant to the Stipulation and Agreement entered into by the Parties on February 29, 2000. The Parties will meet upon the findings of the audit and will determine whether the DMOQs are appropriate at that time.

Richard A. Smith
July 3, 2001
Page 3

We look forward to working with Eschelon and completing the audit process.¹

Sincerely,


Audrey McKenney

¹ Notwithstanding anything herein to the contrary, we also acknowledge that both parties may rely upon, and make use of the contents of this letter as accurately setting forth the matters agreed upon.

EXHIBIT

10

EXHIBIT

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CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

This Confidential Billing Settlement Agreement ("Agreement"), dated October 30, 2001, is between Qwest Corporation ("Qwest") and Eschelon Telecom, Inc. ("Eschelon") (collectively the "Parties") who hereby enter into this Confidential Billing Settlement Agreement with regard to the following:

RECITALS

1. Qwest is an incumbent local exchange provider operating in various states.
2. Eschelon is a competitive local exchange provider that operates in various states.
3. Qwest and Eschelon are parties to interconnection agreements, executed pursuant to sections 251 and 252 of the federal Telecommunications Act of 1996 ("Act") and approved by the appropriate state agencies referred to hereinafter as the "Interconnection Agreements."
4. Various billing disputes, including, but not limited to, pricing and switched access minutes, have arisen between the Parties under the Interconnection Agreements and applicable tariffs regarding interconnection services and unbundled network elements, provided by one Party to the other (referred to hereinafter as the "Disputes").
5. In an attempt to finally resolve the Disputes and to avoid delay and costly litigation, and for valuable consideration, the Parties voluntarily enter into this Agreement to resolve fully the Disputes.

CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

6. Qwest and Eschelon agree to resolve the Disputes as of the date of this Agreement as follows. In consideration for Qwest's payment to Eschelon described in this paragraph, Eschelon

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agrees to the waiver and release described in paragraphs 7 and 8 below. Qwest will make a one-time payment to Eschelon in the amount of \$1.344 million. Qwest will wire that sum of money to Eschelon within five (5) business days of the execution of this Agreement.

7. Eschelon agrees to convert to the mechanized process for receiving access records on November 8, 2001. The current manual and mechanized processes will be run in parallel to identify operational issues, if any. As part of the mechanized process, the Qwest carried intraLATA toll traffic will be part of the mechanized records. Commencing with January 1 2002, Eschelon will rely solely on the mechanized process. The Parties agree to use the executive business escalation process to address any disputes related to switched access issues. As part of this Agreement, the Parties agree that the July 3, 2001 letter from Audrey McKenney to Richard A. Smith, Re: Status of Switched Access Minutes Reporting, is terminated and that all obligations stated therein have been satisfied. Further, Eschelon agrees to deliver to Qwest all reports, work papers, or other documents related to the audit process described in that letter. Eschelon will certify to Qwest within 10 days of execution of this Agreement that it has delivered to Qwest all reports, work papers, or other documents (originals and copies) as required by this Agreement. If Eschelon violates this provision of this Agreement it shall be a material breach of this Agreement. Regardless, the Parties and their agents or consultants shall treat such information as confidential and subject to Rule of Evidence 408.

8. For valuable consideration to be paid by Qwest to Eschelon as provided in paragraph 6 above, Eschelon hereby releases and forever discharges Qwest and its associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, employees of affiliates, employees of parents, employees of subsidiaries, affiliates, parents, subsidiaries, insurance carriers, bonding companies and attorneys, from any

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and all manner of action or actions, causes or causes of action, in law, under statute, or in equity, suits, appeals, petitions, debts, liens, contracts, agreements, promises, liability, claims, affirmative defenses, offsets, demands, damages, losses, costs, claims for restitution, and expenses, of any nature whatsoever, fixed or contingent, known or unknown, past and present asserted or that could have been asserted or could be asserted through the date of the execution of this Agreement in any way relating to or arising out of the Disputes.

9. The terms and conditions contained in this Agreement shall inure to the benefit of, and be binding upon, the respective successors, affiliates and assigns of the Parties. In addition, the terms and conditions of this Agreement, including all facts leading up to the signing of this Agreement shall bind the Parties.
10. Each Party hereby covenants and warrants that it has not assigned or transferred to any person any claim, or portion of any claim which is released or discharged by this Agreement.
11. The Parties expressly agree that they will keep the substance of the negotiations and or conditions of the settlement and the terms or substance of Agreement strictly confidential. Except for purposes of enforcing this Agreement, the Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of negotiations and/or conditions of the settlement and the terms or substance of this Agreement to any person, judicial or administrative agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written

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consent of the other Party unless compelled to do so by law. It is expressly agreed that this confidentiality provision is an essential element of this Agreement. The Parties agree that this Agreement and negotiations, and all matters related to these two matters, shall be subject to the Rule 408 of the Rules of Evidence, at the federal and state level. The Parties further agree that a breach of the confidentiality provisions of this Agreement will materially harm the other Party in a manner which cannot be compensated by monetary damages, and that in the event of such breach the prerequisites for an injunction have been met.

12. In the event either Party has a legal obligation which requires disclosure of the terms and conditions of this Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided for in this Agreement. At least ten days advance notice under this paragraph shall be provided to the other Party, whenever possible.

13. This Agreement constitutes the entire agreement between the Parties and can only be changed in a writing or writings executed by both of the Parties. Each of the Parties forever waives all right to assert that this Agreement was a result of a mistake in law or in fact.

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14. This Agreement shall be interpreted and construed in accordance with the laws of the State of Colorado, and shall not be interpreted in favor or against any Party to this Agreement except as expressly provided herein.
15. The Parties have entered into this Agreement after conferring with legal counsel.
16. If any provision of this Agreement should be declared to be unenforceable by any administrative agency, court of law, or other tribunal of competent jurisdiction the remainder of the Agreement shall remain in full force and effect, and shall be binding upon the Parties hereto as if the invalidated provision were not part of this Agreement.
17. Any claim, controversy or dispute between the Parties in connection with this Agreement, shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, not state law, shall govern the arbitrability of all disputes. The arbitrator shall only have the authority to determine breach of this Agreement, but shall not have the authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator.
18. The Parties acknowledge and agree that they have legitimate disputes about the billing and provisioning issues and that the resolution reached in this Agreement represents a

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compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this Agreement cannot be used against the other Party.

19. This Agreement may be executed in counterparts and by facsimile.

Oct-30-01 07:40pm From: QWEST

3038967473

T-043 P.012/012 F-953

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IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this 30th day of October, 2001.

Escheion Operating Company

QWEST Corporation

By: _____

By: _____

Title: _____

Title: _____

Audrey McKenney

SUP-Wholesale MKB

EXHIBIT

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Confidential Purchase Agreement

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This Purchase Agreement ("PA") is made and entered into by and between Eschelon Telecom, Inc. ("Eschelon") and Qwest Service Corporation ("Qwest") (collectively, the "Parties") effective on the 30th day of October, 2001.

The Parties have entered into enter this PA to facilitate and improve their business and operational activities, agreements and relationships. In consideration of the covenants, agreements and promises contained below the Parties agree to the following:

1. This PA is entered into between the Parties based on the following conditions, which are a material part of this agreement:

1.1 This PA shall be binding on Qwest and Eschelon and each of their respective successors and assigns.

1.2 This PA may be amended or altered only by written instrument executed by authorized representatives of both Parties. Each of the Parties forever waives all right to assert that this Agreement was the result of a mistake in law or in fact.

1.3 The Parties, intending to be legally bound, have executed this PA effective as of October 30, 2001, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

1.4 Unless terminated as provided in this section, the term of this PA is from January 1, 2002 until December 31, 2002. This PA may be terminated during the term of the agreement in the event of a material breach of the terms of this Agreement.

1.5 If either Party's performance of this PA or any obligation under this PA is prevented, restricted or interfered with by causes beyond such Parties' reasonable control, including but not limited to acts of God, fire, explosion, vandalism which reasonable precautions could not protect against, storm or other similar occurrence, any law, order, regulation, direction, action or request of any unit of federal, state or local government, or of any civil or military authority, or by national emergencies, insurrections, riots, wars, strike or work stoppage or material vendor failures, or cable cuts, then such Party shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction or interference (a "Force Majeure").

1.6 The Parties agree that they will keep the terms and conditions, substance of the negotiations and/or conditions of this PA, and any documents exchanged pursuant to this PA strictly confidential. The Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of the negotiations and the terms or substance of this PA or any documents pursuant to this PA, to any person, judicial or administrative agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other Party unless compelled to do so by law or unless Eschelon pursues an initial public offering, and then only to the extent that disclosure by Eschelon is

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necessary to comply with the requirements of the Securities Act of 1933 or the Securities Exchange Act of 1934. In the event Eschelon pursues an initial public offering, it will: (1) first notify Qwest of any obligation to disclose some or all of this PA; (2) provide Qwest with an opportunity to review and comment on Eschelon's proposed disclosure of some or all of this PA; and (3) apply for confidential treatment of the PA. In addition to a potential public offering, Eschelon may pursue private placements or other forms of investments in Eschelon or one of its subsidiaries or affiliates. In the event that potential investors require Eschelon to provide them with information subject to this Confidentiality provision, Eschelon will: (1) first notify Qwest of any obligation to disclose some or all of the confidential information; (2) provide Qwest with an opportunity to review and comment on Eschelon's proposed disclosure of some or all of the confidential information; and (3) require the other party to sign a non-disclosure agreement before providing the confidential information. It is expressly agreed that this confidentiality provision is an essential element of this PA and negotiations, and all matters related to these matters, shall be subject to Rule 408 of the Rules of Evidence, at the federal and state level. In the event either Party has a legal obligation which requires disclosure of the terms and conditions of this Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided for in this Agreement. At least ten days advance notice under this paragraph shall be provided to the other Party, whenever possible. As noted previously, it is anticipated that the Parties shall exchange confidential information (i.e. most likely that Qwest will deliver to Eschelon confidential information) in performing the obligations contained in this Agreement. The Party receiving such confidential information ("Receiving Party") shall treat such information as it would treat its own confidential information. In addition, the Receiving Party shall not disclose the confidential information outside its company and only with those employees have a need to know. The Receiving Party shall not copy such confidential information without the written consent of the other Party. In addition, the Receiving shall return the confidential information of the other Party upon demand of such Party.

1.7 Neither Party will present itself as representing or jointly marketing services with the other, or market its services using the name of the other Party, without the prior written consent of the other Party.

1.8 This PA shall be interpreted and construed in accordance with the laws of the State of Colorado and shall not be interpreted in favor or against any Party to this Agreement.

2. In consideration of the agreements and covenants set forth above, Qwest agrees to purchase from Eschelon, during the Term of this PA, \$1.8 million in carrier-related services ("Services"), to be paid ratably within five business days of the last day of each month, for the period January through December 2002. The payment described in this paragraph will be made so long as Qwest determines that Eschelon is performing consistent with this Agreement and is providing satisfactory Services. The Services may include, but are not limited to, Eschelon providing Qwest with the following: analyses of carrier pricing by market and market segment and comparisons between carriers; peer group benchmarking, including comparisons of operational and financial aggregate metrics of carriers; consulting services for Qwest's out-of-region CLEC operations on operational, financial or other issues; special projects that may be

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requested on an ad hoc basis; monthly consultative meetings with top Eschelon executives; and other consulting services regarding Qwest's products and processes, including but not limited to Change Management functions.

2.1 The Parties will resolve any disputes under this Agreement pursuant to the Escalation Procedures established by the Parties. Any claim, controversy or dispute between the Parties in connection with this Agreement, shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, not state law, shall govern the arbitrability of all disputes. The arbitrator shall only have the authority to determine breach of this Agreement, but shall not have the authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator.

3. As part of the Services described herein, it is anticipated that the parties will exchange confidential and proprietary information. Specifically, it is anticipated that Qwest shall provide confidential and proprietary, and sensitive information to Eschelon. Accordingly, as a material element of this PA, unless otherwise requested by Qwest or an affiliate, and out of an abundance of caution that Eschelon not misuse (intentionally or by mistake) such information, Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest interests may be implicated, including but not limited to, formal and informal proceedings related to Qwest's or its affiliates' efforts to obtain relief pursuant to section 271 of the Telecommunications Act of 1996, including but not limited to, Change Management Process workshops, performance indicator/assurance dockets and cost dockets. Notwithstanding the foregoing, since Eschelon will help Qwest with, including but not limited to, its business process, products and operations, Eschelon shall, when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively). In addition, upon request by Qwest, Eschelon will withdraw or dismiss existing proceedings.

Made and entered into on the 30th day of October, 2001, by Eschelon and Qwest.

Eschelon Telecom, Inc.

Qwest Services Corporation

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Authorized Signature

Audrey McKenney
Authorized Signature

Name Printed/Typed

Audrey McKenney
Name Printed/Typed

Title

Senior VP - Wholesale Mktg
Title

Date

10-30-01
Date

EXHIBIT

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EXHIBIT

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